Supreme Court, U.S.
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No._____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2006

Nathan B. Spooner

v.

City of Grover Beach

On Petition for a Writ of Certiorari to the
Court of Appeal, Second Appellate District, Division Six,
State of California

PETITION FOR A WRIT OF CERTIORARI

Nathan B. Spooner
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Petitioner in pro se

QUESTIONS PRESENTED

Petitioner claims a 14th amendment violation by the city when he was compelled to remove a trailer from private property while other residents were not so compelled. Petitioner claims this disparate treatment was based on his interracial marriage.

A. Is animus or ill will a necessary element of a civil rights, class-of-one claim?

B. Is the state Appellate Court consistent with the Supreme Court in ruling that a civil rights claim fails against a municipality when the Appellate Court fails to apply the law as stated by federal courts?

C. When a Petitioner pro se, in a civil rights claim, states an opinion at a hearing, why should that opinion rise to the level of a judicial admission?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2006

NATHAN B. SPOONER, *Petitioner*

CITY OF GROVER BEACH, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX,

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Nathan B. Spooner respectfully petitions for a writ of certiorari to review a judgement of the Court of Appeal, Second Appellate District, Division Six, of the State of California

OPINIONS BELOW

The opinion of the court of appeals (App. A., pp.1-15) is unreported as *Spooner v. City of Grover Beach,* Cal. Rptr. 3d 2005 WL 3304982, (Nonpublished/Noncitable)

The ruling of the trial court (App. B., pp. 1-5)

JURISDICTION

The court of appeals entered its judgement on December 7, 2005. (App. A. pp 1-15). The supreme court of the state of California denied Petition for review on Feb. 22, 2006 (App. C. p.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 of the Civil Rights Act of 1871 and 1964

STATEMENT

Petitioner removed a vehicle from private property after being cited for a code violation. The City did not enforce the code for dozens of other violators even though petitioner filed complaints for more than 33 months with written, phone and in person complaints.

At the first hearing, Petitioner stated an opinion that he did not think there was any racial discrimination against him but then amended his complaint to state the discrimination was based on his interracial marriage. The trial court accepted this amended complaint but ruled that Petitioner did not state a claim. The appellate court also ruled there was no equal rights claim, and they ruled that Petitioner made a judicial admission which contradicted his original claim.

A. Discriminatory Enforcement of City Vehicle Code.

In August, 1998, Petitioner parked a 24 foot trailer on his property. He was cited by the City and informed that trailers over 22 feet in length parked on private property in violation of Section 5217, Grover Beach Municipal Code (GBMC 5217). Petitioner then moved the vehicle to a storage yard.

Shortly after this time Petitioner noticed other trailers in his neighborhood that were also over the 22 foot length. He met several time with the city manager to discuss the issue. After two years of complaints by phone, in writing and in person, Plaintiff appeared before the full body of the city council and asked why others were not compelled to move their vehicles (trailers, RV's and a 32 foot truck), all parked in driveways and on a public street in his neighborhood.

On April 21, 2000 (20 months after the initial complaints), Petitioner received a letter from the chief of police stating that they had been without a code officer and also stating that code enforcement is complaint driven.

On June 20, 2001, Petitioner parked his trailer on the street in front of his home in order to clean and repair it. On the very next day, Petitioner received a Notice of 72 hour parking violation. That next day, when police officers came to Petitioner's residence to ask Petitioner's wife if they intended to move the vehicle, she told them that they would do so. When Petitioner's wife pointed to a vehicle up the street that was not in compliance with the code and asked why it was not cited, the officers drove away and her complaint was ignored.

On June 30, 2001 Petitioner filed a Verified Complaint

form with the city for recovery or storage rents, depreciation, and general damag[illegible] failure to enforce the code for other violators. This claim was rejected by the city on August 6, 2001.

On July 5, 2001, Petitioner received a letter from the code enforcement officer stating that two of the locations referenced in one of Petitioner's complaints had been addressed and moved as required (now 33 months after the initial complaints). The letter also stated that some vehicles were exempt from the ordinance due to a "grandfather clause", or due to "side yard or rear yard" considerations and this could explain why some vehicles are allowed to remain while some are not.

On July 7, 2001, Petitioner addressed a city council meeting to inquire as to why the city did not enforce the code for other similarly situated residents with vehicles on private property or on city streets. Most of those other vehicles were not exempt even with the "grandfather clause" or "side yard or rear yard" reasons. The oversized vehicle on the street was also not exempt. The city offered no response.

B. Proceedings Below

On February 1, 2002, after having exhausted all obvious administrative remedies with the City, Petitioner filed a civil complaint against the City. On August 8, 2002, during mediation with the court, the claim was tolled through February 8, 2003.

Petitioner filed his complaint on Feb. 6, 2003 for: Arbitrary and Improper Selective Code Enforcement and for Denial of Equal Protection. Petitioner cited *Village of Willowbrook v. Olech* (2000) 120 S.Ct. 1073 in support of his contention of a violation of equal protection based on a class of one. The trial court in its ruling of August 20, 2003, (App. B. p.4) stated that "it does not appear that Willowbrook v. Olech applies to a case such as this one, where Plaintiff claims merely that the local laws are being enforced against him and not against others."

The trial court further stated (App. B. p 5)

> "In this case, Plaintiff does not allege vindictive action, or ill will, nor does he allege that the action was taken against a member of a protected class. Although referring to his wife's ethnicity in the Complaint, the Complaint does not allege that the City of Grover Beach took action based upon her ethnicity or race, and Plaintiff stated at the hearing that the Complaint was not based on such an allegation."

For these reasons, the trial court sustained defendant's

demurrer with leave to amend.

At the second amended complaint, Sept. 17, 2003, Petitioner claimed that the animosity or ill will present in the city's actions was based on his interracial marriage. Petitioner hired a court reporter at this hearing and the trial court accepted his amended theory that he had stated a claim for discrimination by the city based on racial discrimination.

> [RT.4:23-25] "Is it now your contention that in fact the city did act wrongfully or inappropriately towards you, or you and your wife as a unit, based on you wife's ethnicity?"
>
> [p.4: 26] "Yes I am claiming that your honor."
> [p. 5: 18-20] "And I have also shown animus or ill will based upon my interracial marriage, which I think is sufficient to show that there is an element of discrimination."
>
> [p. 6:24-26] "To the extent that you allege that the basis for the city action is racial discrimination, I think that you properly set forth a claim."

Petitioner's reasoning was that since he could not claim racial discrimination from Caucasian male members of the City against himself, a Caucasian male, then it was alleged that the discriminatory intent to enforce the code selectively derived from and was directed toward his interracial marriage.

The appellate court interpreted all this to be a judicial admission (App. A. p.15-16), namely, that my opinion in the

first hearing that there was no discrimination toward me, necessarily implied that I asserted there was no discrimination of any kind. But this is logically inconsistent. To say there was no ill will toward me is not the same as to say there was no ill will toward me and my wife as a unit.

Even though my wife was not named in the suit, my formal and legal relationship with her permits me to amend the complaint to claim animus based upon our marriage.

A judicial admission cannot be based upon an opinion. The trial court granted leave to amend, which is what I did. And the court accepted the amended theory as would any reasonable person.

The trial court then rejected defendant's argument on this issue:

> [RT.7: 7-13] "Mr. Gundert's argument that I should deem your prior statements to be judicial admissions and foreclose you from amending have been considered by me. I appreciate the clarification and given the pro per statue, my tentatively ruling is to allow that on the basis that Mr. Spooner is not contradictory but supplementing his argument for the reasons he stated."

The trial court accepted the amended claim that ill will or animus was directed toward my interracial marriage.

The trial court and the appellate court both ruled, however, that Petitioner had not stated a claim because of

their interpretation of *Olech* and misapplication of *Monell* standards.

The questions presented here are whether Petitioner's *Olech* based class of one claim can be decided in a manner consistent with the Supreme Court intent on the matter. Since there is a divergence of ruling and opinions on *Olech*, and the trial court and the appellate court in petitioner's case misinterpreted it in both instances, how can justice be served in the case at issue?

Another issue is whether municipal liability can ever be determined if the trial court and the appellate court refuse to apply Supreme Court standards when considering petitioner's claim?

Lastly, why should an opinion in a law and motion hearing rise to the level of a judicial admission? When an opinion is later amended in a manner acceptable to the trial court, why should the appellate court be allowed to disregard American Jurisprudence Evidence Standards?

REASONS FOR GRANTING THE PETITION

The Supreme Court could clarify the issues in *Olech*. As a result of divergence of rulings in several federal courts, it does

not seem equitable that one person would prevail in an equal rights, class of one ruling, while someone in a different geographical location with the same set of factual circumstances will not be allowed to proceed.

1. The Appellate Court's Interpretation of *Village of Willowbrook v. Olech* Conflicts with Federal Courts of the 6th, 7th, 9th,10th, 11th Circuit Opinions.

In Petitioner's case, the trial court and the Appellate Court misapplied and contradicted Supreme Court rulings in their class of one, equal protection analysis.

The trial court stated [RT.6: 15-20],

> "I think that the Olech case stands for the principle that a class-of-one status may be sufficient where the government acts on a land use application or other similar type of application, but not in a case in which there is prosecution for violations of the municipal code or other similar violations."

The appellate court also reasoned (App. A. p.14-15) that "illegitimate animus" was a necessary element for an *Olech* based class of one claim. They concluded (Ibid. p.16) that Spooner did not plead such facts.

The court also states that Spooner " successfully obtained enforcement by the City against two other owners."

This assertion ignores the fact that Petitioner was the only one cited for over 33 months before the city took action. During those 2 plus years, the city took no action on Petitioner's complaints. During that time the city was in violation of Petitioner's equal rights.

The Supreme Court recognized class-of-one equal protection actions in *Willowbrook v. Olech* 528 U.S. 564-65,120 S. Ct. (2000). In that case, a municipality conditioned water service for a property on the owner's granting a 33-foot easement, even though it required only a 15-foot easement from every other property owner. Id. at 563.

In *Olech*, the Supreme Court allowed an equal protection claim to survive a motion to dismiss because the municipality's demand was alleged to be "irrational and arbitrary." Id. at 565. In his concurring opinion, Justice Breyer, Id. at 566, states that the added factor such as "vindictive action," "illegitimate animus," or "ill will" does allow a class of one claim to rise to a civil rights claim. That factor would prevent this case from transforming run-of-the-mill zoning cases into cases of constitutional right.

Petitioner's claim is unique in that in his first complaint he argued that the *Olech* based discriminatory

enforcement was based on lack of rational reason, believing, after O*lech*, that he did not need to show animus.

In his second amended complaint, after the trial court had ruled that he had not shown "ill will", Petitioner argued that the City's discriminatory action was based on racial discrimination due to his interracial marriage. The trial court accepted this amended theory (supra, RT 6:24-26). However, due to erroneous application and a misunderstanding of *Olech*, the trial court and then the Appellate Court sustained the demurrer.

The appellate court (App.A. pp.14-15) reasoned that the class of equal protection cases illustrated by *Olech* always require illegitimate animus toward the plaintiff. The court also stated that Petitioner had not plead such facts.

In a recent opinion differing from the Supreme Court, the 11th Circuit Court, *Campbell v. Rainbow City,* 434 F.3d. 1306 (11th Cir. 2006), points out the developing deviation with the Supreme Court ruling in *Olech*. "There seems to be a newer trend in equal protection law, "a class of one claim" without a necessary showing of animus, ill will or discriminatory purpose."

> n.6 "Some circuits have read *Olech* to still require ill will on the part of the defendant. See, e.g. *Purze v.*

> *Village of Winthrop Harbor*, 286 F.3d 452, 454 (7th Cir. 2002), While other circuits following Olech have found that a plaintiff can also bring successful equal protection claim merely by "negativing every conceivable basis which might support" the government action. *Warren v. City of Athens, Ohio*, 411 F.3d. 697, 711 (6th Cir. 2005)."

In yet another decision that diverts from Justice Breyer's concurring opinion on the need for illegitimate animus, *Cobb v. Pozzi*, 363 F.3d 89 (2d cir.2003), states that:

> " Unlike their selective prosecution claim, the plaintiff's Olech-based equal protection claim is not dependent on their ability to prove that they were disciplined for an impermissible reason...Rather, under Olech, the [**57] plaintiffs can recover if they can show that they were treated differently from similarly situated officers, ...and that there was "no rational basis for the difference in treatment."

In Cobb, the Court granted a new trial on the plaintiff's Olech based equal protection claims.

When after 33 months of complaints, the city finally cited two other residents for code violations, one of them re-parked their vehicle shortly thereafter with no consequences, and the other was a minority family. It is almost laughable that the Appellate Court took this as evidence that I was not the only one cited and thus do not have a claim.

Clearly, during those two plus years of non-enforcement, Petitioner's *"class of one"* based claim would

have given rise to a claim based on allegations of either "ill will" or "no rational basis" on the part of the City.

In a recent opinion of the USCA for the 7th District, *Racine Charter One, Inc. v. Racine Unified School District*, 424 F. 3d. 677, (7th Cir. 2005), in its analysis of "rational basis", the court points out that:

> "since Olech was decided, the standard for such class of one claims had been muddled in this circuit by two divergent lines of cases. *Tuffendsam v. Dearborn County Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004) (recognizing divergent lines)"
> "In one line of cases, panels of this court have held that a class of one equal protection claim is established where the defendant has intentionally treated the plaintiff differently than others similarly situated either without any rational basis for doing so or out of some "totally illegitimate animus." See *Lunini v Grayab*, 395 F.3d 761, 768 (7th Cir. 2005)".
> (p.12) "In another line, however, we have held that the mere absence of a rational basis is not enough to sustain the class of one claim, and that instead the plaintiff must prove illegitimate animus in order to succeed. See *Hilton v. City of Wheeling*, 209 F.3d 1005,1008 (7th Cir. 2000)."

In a decision that required illegitimate animus, the 9th Circuit in *Squaw Valley Dev. C. V. Goldberg, Singer*, 375 F. 3d 936 (9th Cir. 2004), reversed the grant of summary judgement on *Squaw Valley's* class on one equal protection claim and ruled that plaintiff can show the defendants' rational basis for selective enforcement is just pretext for "an impermissible

motive". *Squaw Valley* contended that it was (1) singled out, that (2) defendant's actions were arbitrary or irrational and (3) that the unequal treatment was based on animosity. These three criteria apply in Petitioner's case as well.

In a case that discusses the paradigmatic "class of one", *Apachie Nation v. Rio Arriba County*, 440 F.3d 1202 (10th Cir. 2006), the court recognizes the struggle that courts have with the 'extra factor' posited by Justice Breyer.

Where the Appellate Court in Plaintiff's case clearly fails to apply the Supreme Court decision in *Olech* in either variation (either with or without animus), because of error or oversight, the Court could grant certiorari and allow Petitioner to further his claim of selective enforcement based on racial discrimination.

At the same time, the Court could settle the issue of when is animus a necessary element of a 14th amendment, equal rights claim. I believe the framers of the Civil Rights Act of 1871, and the Civil Rights Act of 1964 intended the law to serve all citizens equally.

II. The *Monell* Analysis of the Appellate Court Is Erroneous.

Since 1871, the 42 U.S.C. § 1983 statute has provided

federal remedy to persons deprived of federal constitutional right by persons acting under color of state law. It is not, however, clear how policies or customs must be causally linked to a violation if liability is to be imposed on a municipality. As argued below, the appellate court of California takes one stance and ignores federal case law. The Supreme Court and Circuit Courts of Appeal do not make consistent interpretations on the threads of causality.

I never argued that an unconstitutional policy caused the violation in this case. I never argued that a long standing custom caused the violation. I argued that someone in the employ of the City, acting as final policymaker, authorized the continued unconstitutional action against me.

I argued that an official with final decision-making authority either delegated policy-making authority to a subordinate or ratified subordinate's unconstitutional decisions or actions.

The Appellate Court stated that (App. A pp.10-11)

> "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy... Alternatively, [it] may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." *Choate v.*

> *County of Orange* (2000) 86 Cal. App. 4th 312, 328. Thus, a Civil Rights claim fails against a City because entity liability arises in only two forms: Policy or Custom. (*Choate*, at p. 328.)

The Court ruled that Petitioner does not meet this standard (App. A. p.12),

> "Spooner does not specifically describe the City's Policy or how it trained or supervised enforcement officers. He does not state facts showing it had a history of encouraging or condoning discrimination. Nor does he supply "any underlying factual detail" about how it was the moving force or proximately caused his damages. (*Haskins v. San Diego Dept. of Public Welfare* (1980) 100 Cal. App.3d 961, 973.)"

However, as stated clearly in *Occhionero v. City of Fresno*, U.S.D.C. for the Eastern District of California, (U.S. Dist. LEXIS 12025, 2006) "The determination of who has final policymaking authority is a question of law for the court to decide...which includes "state and local positive law as well as custom or usage having the force of law." *Jett v. Dallas Indep. Sch. Dist.* 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989).

And also in *Occhionero*,

> "Nothing in *Rule 8(a)* requires Plaintiff, at this stage of the proceedings, to specifically name who ratified the unconstitutional conduct. *Defendant is on notice that one of Plaintiff's theories of liability is that a final policymaker ratified the actions against Plaintiff* [italics added]. Here, it is not clear "that no relief could

> be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz*, 534 U.S. at 512.

Additionally, the Supreme Court has ruled that a single decision by a municipal policymaker could constitute a municipal policy that would justify imposing municipal liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The Pembaur Court could not agree on how to identify a policymaker. (Id. at 481-82). Justice O'Connor argued that identifying a policymaker is a question to be answered by state law. *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988). Justice Brennan argued that state law is the appropriate starting place for resolving the question, but that ultimately the fact-finder must determine where policymaking authority actually resides.

Justice Brennan also asserted, *City of Oklahoma v. Tuttle*, 471 U.S. 833 n.8, (1985) that the distinction between constitutional and unconstitutional policies was unnecessary and "metaphysical." He also said, in discussing his divergence from the plurality on the issue, that in this instance, the other justices needlessly complicate the municipal liability issue and left it more unsettled than clarified (Id. at 825).

Petitioner's claim, when he addressed the city council on the issue, involved addressing <u>*all*</u> possible policymakers in

his complaint. The Appellate Court's erroneous ruling will not allow Petitioner to proceed in order to discover who would be a final policymaker among the variously questioned city officials.

The Supreme court, in 1978, empowered section 1983 by ruling in *Monell v. Dept. of Social Services*, (1978) 436 U.S.658, 691, that municipal liability could be based upon unconstitutional policies or custom. Thus, a violation of an individual's civil rights by a municipality could give rise to liability. Since that decision, the Court has not explained how policies or custom must be causally linked to a violation when liability is to be imposed. The Court has left it to various states to determine whether only a constitutionally violation can give rise to liability, whether a policy give rise to liability. So it seems that the degree of civil rights protection depends partly on where a victim resides and that should not be the final test of liability.

The Appellate Court takes the position (App.A. pp.10-11) that only unconstitutional policy or longstanding custom could lead to liability. But their ruling ignores federal appeals court ruling such as in *Lytle v. Carl*, 382 F.3d. 978 (2004),

> "It does not matter that the final policymaker may have subjected only one person to only one unconstitutional action. As we wrote in Christie, "[A] municipality can be liable for an isolated constitutional violation when the person causing the violation has final policymaking authority. 176 F.3d at 1235"

It would seem that certiorari could be granted here where the Appellate Court misconstrued or misapplied an applicable Supreme Court decision on this issue.

In a USCA 9th Circuit ruling, *Lytle v. Cram and Clark County School District*, (2004), 382 F. 3d 978 (Sept.1, 2004), the 9th circuit ruled that liability may be premised under any of three theories:

(1) Acting Pursuant to an Expressly Adopted Official Policy.

(2) Acting Pursuant to a Longstanding Practice or Custom.

(3) Acting as a "Final Policymaker".

The appellate court mistakenly denied Petitioner even the means to consider who among city officials would be the final policymaker. Petitioner had questioned <u>all</u> relevant city officials on the issue. He presented the issue of discriminatory enforcement to the city mayor, the city council, the city manager, the city attorney, the chief of police. It would seem

that someone in the above array has "final policymaking authority".

In line with *Occhionero* (supra) Petitioner had claimed that "Defendant is on notice that one of Plaintiff's theories of liability is that a final policymaker ratified the actions against Plaintiff.".

Further, policy may also "be delegated by an official who possesses such authority." *Pembaur v. Cincinnatei*, 475 U.S. 469, 483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986)

Petitioner never argued that an unconstitutional policy caused the violation in his case. He never argued that a long standing custom caused the violation. He argued that someone in the employ of the City, acting as a final policymaker, authorized the unconstitutional action against him.

It would seem that the Appellate Court clearly fails to apply prior Supreme Court decisions here because of error or oversight, and certiorari should be granted.

III. When may an opinion rise to the level of a judicial admission?

When a Petitioner pro se, in a civil rights claim, states an opinion at an unrecorded hearing, why should that opinion

rise to the level of a judicial admission?

AMJUR EVIDENCE S 770

> "A judicial admission is a formal statement...which removes an admitted fact from field of controversy." " [FN87] In order to constitute a judicial admission, the statement must be one of fact, not opinion."

> "A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within that party's peculiar knowledge, not a matter of law. In order to constitute a judicial admission, that statement must be one of fact, not opinion."
> "For a judicial admission to be binding, it must be an unequivocal statement of fact." *Kohne v. Yost*, 250 Mont. 109, 818 P2d 360.

When Petitioner was asked at his first hearing whether there was racial animus on behalf of the city, Petitioner answered there was not, meaning there could not be racial discrimination against him, a Caucasian male. Petitioner understood that he could not claim racial discrimination against him coming from other Caucasian males. So when Appellant amended his complaint to claim racial discrimination, based on his interracial marriage, the trial court at the next hearing accepted this modified theory.

As the trial court concluded: [RT. 7: 11-13]

> "my tentatively ruling is to allow that on the basis that Mr. Spooner is not contradicting but supplementing his argument for the reasons he stated."

The clarification requested by the trial court allowed Petitioner to establish a claim of illegitimate animus of behalf of the City of Grover Beach.

No court reporter was present at the first hearing and Petitioner's intended meaning was that there was no racial animus based on Petitioner's ethnic background, but not to deny that some sort of animus could exist based on his interracial marriage. *Appellant's statement was not sworn testimony, was not an affidavit, was not an interrogatory or admission.* The trial court recognized this and after Petitioner's explanation of the reasons for his original statement and then amending the complaint, the trial court stated [RT:9:3-6]

"those statements were made off the record. We don't have anything on the record and I can't contradict Mr. Spooner's analysis..."

The above is what the defendant and the appellate court interpreted as a judicial admission, namely, that a Caucasian male stated that he did not claim racial discrimination against himself by other Caucasian males and subsequently, when his amended claim included the theory of racial animosity based on his interracial marriage, this explanation was rejected by the appellate court even though it

had been accepted by the trial court.

When a Petitioner pro se, in a civil rights claim, states an opinion at an unrecorded hearing, why should that opinion rise to the level of a judicial admission? And why should the Appellate Court's misapplication of the rules of AMJUR evidence prevent Petitioner from furthering his claim of a 42 U.S.C. § 1983 violation that is premised on his interracial marriage?

IV. The Questions Presented are Important.

The standards for a class of one equal rights claim appear to vary according to various circuit courts. The threads of causality in municipal liability violations appear to leave open the door to various interpretations. A pro se litigant is not a practicing attorney. Why should not an ordinary citizen be afforded the courtesy to have his brief taken seriously by these lower courts?

CONCLUSION

The petition for a writ of certiorari should be granted.

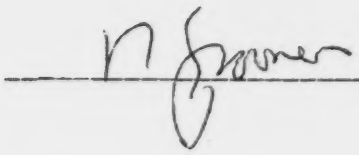
I believe the framers of the Civil Rights Act of 1871, and the Civil Rights Act of 1964 intended the law to serve all

citizens equally. Otherwise, a citizen living in one area of the country will have a case decided in their favor or against them depending on geographical location. Just as *Yick Wo v. Hopkins*, (1886) 118 U.S. 356, only 5 years after the Civil Rights Act of 1871 helped define equality from discrimination for United States citizens, do I not benefit from these decisions as well? Does a civil rights claim in California become denied while a similar claim in Virginia goes to trial because claimants live in different parts of America?

Would Petitioner's class-of-one claim survive a motion to dismiss if it was presented in another appellate district? Should the Supreme Court allow citizens to be subject to unequal treatment when the issues here could be clarified by the Court?

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Nathan B. Spooner

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

NATHAN B. SPOONER
Plaintiff and Appellant

2d Civil No. B178096
(Super. Ct. No. CV030134)

CITY OF GROVER BEACH et. al.,
Defendant and Respondent

(SanLuis Obispo County)
FILED Dec. 7 2005

Jospeh A. Lane, Clerk
Deputy Clerk

Plaintiff Nathan B. Spooner appeals a judgement dismissing his discrimination action against City of Grover Beach (City) after the trial court sustained a demurrer to his third amended complaint. The trial court properly sustained the demurrer. Spooner's complaint relied on conclusory allegations

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and was uncertain. He did not plead valid causes of action against the City for exempting some homeowners from a recreational vehicle ordinance, for discriminatory enforcement of the ordinance, for violation of the federal Civil Rights Act (42 U.S.C. § 1983) or for denial of equal protection. He also made admissions in court which underminded his pleadings. We affirm.

FACTS

In 1996, the City enacted Grover Beach Municipal Code (GBMC) section 5217, which provides that trailer coaches exceeding 22 feet in length may only be parked on a side or rear yard of a residence. This restriction does not apply to owners who parked trailers on their property prior to the enactment of the ordinance. (GBMC § 5219.)

Spooner, a "Caucasian," and his wife of "American Indian and African descent," moved to the City in 1998. He parked a trailer exceeding 22 feet in

length in his driveway. His neighbors complained to the City. Spooner moved the trailer to a storage facility after the City's code enforcement officer warned his wife about the ordinance.

Months later, Spooner complained to the City that his neighbors had committed similar violations but had not been cited. On April 21, 2000, John Bradbury, the City's Chief of Police, wrote to Spooner. He stated: "Your complaint regarding trailers has been received. Our new Code Enforcement Officer[] starts work on April 27 and your list will be one of the first complaints that he will work.

[¶] The City has been without an official Code Enforcement Officer for over a year. As a point of information, our Code Enforcement is complaint driven. If no one complains, no actions are taken unless the violation is obvious."

In June of 2001, Spooner moved the trailer to

the street in front of his home. He received a 72-hour parking violation. City police officers asked Spooner's wife to move th trailer. She agreed, but complained that another trailer parked one block away should also receive a citation. The officers drove away.

Spooner again complained to the City about other trailers parked in the neighborhood. On July 5, 2001, Gary Youngblood, the City Code Enforcement Officer, wrote to Spooner. He stated: "You should be aware that each and every complaint that I receive is investigated, but in a prioritized manner. While all of our citizen's concerns are important to us, some require immediate attention....(*The two location reference in your April 13, 2000 complaint, were addressed and were moved as required.*) [¶] [P]lease note the requirements [in GBMC section 5217] for parking R.V.'s on private property...'side or rear yard,' and 'size'.... These factors, along with the

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"Grandfather Clause'-denoting vehicles parked prior to the adoption of the current ordinance - 1996, could serve to mitigate the fact that in some instances R.V.'s are allowed to park, where others are not." (Italics added.)

Spooner's Pleading

On February 6, 2003, Spooner filed a complaint in propria persona against the the City for arbitary and improper selective code enforcement and denial of equal lprotection. The City demurred, claiming the complaint did not state a cause of action and was uncertain.

Spooner filed an amended complaint which contained legal argument. The City demurred and the trial court su[illegible]ined it with leave to amend. His second amended complaint also contained legal arguments. The court sustained a demurrer again with leave to amend.

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On January, 12, 2004, Spooner filed his third amended complaint. He attached Bradbury's and Youngblood's letter as exhibits to that complaint. He pled two causes of action: "Arbitrary and Improper Selective Code Enforcement" and "Denial of Equal Protection." He alleged, among other things: "The unknown...persons who first complained about [his] trailer obviously noticed [his] interracial marriage." He said that because "police cruise[r]s 'came swooping down'...to [his] residence...when the trailer was parked on the street in front of his house, that can only be described as an act of discriminatory hostility."

He alleged" "The ill will or invidious discrimination on the part of the city is from plaintiff's interracially mixed marriage." "There is no other apparent reason for plaintiff having to move a trailer from his own property while at the same time neighbors have similar trailers and RVs in their

driveways..." He claimed it was arbitrary discrimination for the City "to classify some citizens as exempt from the ordinances in question." He alleged that he complained about the enforcement of the ordinance at a city council meeting. But because the City did not respond to his questions, it thereby "approved and sanctioned this action describe above to be an official policy of City government. This policy allows unjustified discretion to code enforcement officials to enforce for some while not to enforce for others."

The Hearing

The City demurred. At the hearing, the court noted that at a prior hearing spooner said he was "not alleging any racial animus on behalf of the City...." The court noted that this complaint added a new theory that the City discriminated against him because he was "new to the neighborhood."

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1. *Defective Pleading*

The demurrer was properly sustained. The City claimed Spooner's complaint was uncertain and included "surmises as to the reasons why he has allegedly sustained harm."

Instead of alleging facts, Spooner speculates. For example, his complaint states: "Plaintiff is Caucasian and his spouse is not. Since the police stated that it was a neighbor's complaint that led to the first citation...and yet plaintiff's complaints have not resulted in other citizens having to move their vehicles...*then the city must feel it is justified in treating plaintiff in a manner different than others because of his interracially mixed marriage.*" (Italics added.) "[*T*]*he unknown person or persons* who first complained who first complained about [his] trailer *obviously noticed* [his] interracial marriage."

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(Italics added.)

In pleading, the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise. [Citation.] (*Bernstein v. Piller* (1950) 98 Cal. App. 2d 441, 443.)

The trial court also found that the allegations of the complaint were inconsistent and contradicted Bradley's and Youngblood's letters, which Spooner attached as exhibits to that pleading. A complaint is demurrable where its allegations are ambigious or contradictory. (*Miller v. Brown* (1951) 107 Cal. App. 2d 304, 306; *Evarts v. Jones* (1951) 104 Cal. App.2d 109, 111. "If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. [Citation.]" (*Holland v. Morse Diesel Internat.*, Inc. (2001) 86 Cal. App.4th 1443, 1447.)

Spooner alleged the city offered no explanation

for not enforcing the restrictions against others. But he attached Youngblood's letter which explained why some vehicles "are allowed to park" and "others are not," and Bradbury's letter which mentioned the personnel shortage.

Spooner alleged that other than his interracial marriage there is "*no other apparent reason*" to explain why he is treated differently. (Italics added.) But he also alleged the City's motives were based on the fact that [he] and [his] family were new to the neighborhood, "that the City vests "unjustified discretion" in code enforcement officers or its ordinances exempt classes of owners. At the hearing, he conceded he was unable to state the reason for the alleged discrimination. The court was not required to speculate about which of the conflicting allegations Spooner relied on. (*Bernstein v. Piller, supra,* 98 Cal. App.2d at p. 443.)

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ll. *Stating a Cause of Action for Arbitrarily Exempting Some Owners from GBMC Section 5217*

Spooner alleged the City arbitrarily discriminates by exempting some owners from GBMC section 5217. But those who purchased their homes prior to its enactment had the expectation that they could park recreational vehicles on their property without restrictions. The retroactive application GBMC section 5217 would interfere withthose expectations. (*Haves v. City of Miami* (11th Cir. 1995) 52 F.3d 918, 922 ["state may legitimately use grandfather provisions to protect property owners' reliance interests"]; *Nordlinger v. Hahn* (1992) 505 U.S. 1, 12; *City of New Orleans v. Dukes* (1976) 427 U.S. 297, 305-306; *Des Jardin v. Town of Greenfield* (1952) 262 Wis. 43,47,49 [53 N.W.2d 784, 786-787].

By contrast, Spooner and others who bought land after 1996 were on notice of the restrictions

before they purchased. Spooner does not allege that the City enacted GBMC section 5217 to racially discriminate. He has not met his burden "to negative every conceivable basis which might support" the ordinance. (*Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356, 364.) The City rationally distinguished between classes of owners who had different expectations when the purchased their homes. (*Nordlinger v. Hahn, supra,* 505 U.S. at p.12, *Del Oro Hills v. City of Oceanside* (1995) 31 Cal. App.4th 1060,1082.)

III. *Stating a cause of Action for Selective Enforcement*

Spooner alleged" The City's "failure to act in enforcing the code for others, demonstrates an intent to punish the exercise of plaintiff's constitutional rights since they decided to enforce the law in a non-uniform manner.... This action also evidences the city's malicious or bad faith intent to deny plaintiff's

constitutional rights." "The standard of 'laxity of enforcement' presumes there is a reasonable explanation as to why the law is not enforced in an evenhanded manner.... Yet in the present case, it is not as if the vehicles are inaccessible." "In Plaintiff's neighborhood, the vehicles are stationary. It is not as if the enforcing officer is unable to find" them.

But these conclusory allegations and arguments do not state facts to support a cause of action. (*Taylor v. Mitzel* (1978) 82 Cal. App.3d 665,675.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law or fact..." (*Blank v. Kirwan* (1985) 39 Cal. 3d 311,318) Moreover, Spooner did not allege whether the vehicle owners he complained about were exempt from the ordinance.

Spooner claimed the City had a duty to enforce the ordinance against all violators. But he does not

allege a statutory basis for this claim. (*Lopez v. City of Oxnard* (1989) 207 Cal. App.3d 1, 13.) He admits he violated the code. The City properly cited him. Discriminatory enforcement is not established simply because all violators are not pursued. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 299.)

Morever, the complaint does not join parties that Spooner claims selectively enforced this ordinance. He alleges police officers ignored his wife's complaint. In conclusory language he alleges they exhibited "discriminatory hostility." He refers to Bradbury, Youngblood and unnamed "city officials." But none of them are named as defendants and his wife is not a plaintiff. The City is the only named defendant.

He alleges the City "refuses to enforce the code for other violators in the city" and claims his complaint "have not resulted in other citizens having to move their vehicles..." But Youngblood's letter undermines

those allegations by showing that two vehicles Spooner complained about were cited and moved. (*Holland v. Diesel Internat, Inc., supra,* 86 Cal. App.4th at p. 1447.)

IV. *Pleading Municipal Liability Under 42 United States Code Section 1983*

Spooner contends he adequately pled facts to state a cause of action against the City under the federal Civil Rights Act. (42 U.S.C. § 1983.) We disagree.

"Local governments have no liability under 42 United States Code section 1983 simply because their employees may have violated a plaintiff's constitutional rights; the doctrine of respondeat superior does not apply." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328; *Monell v Dept. of Social Services* (1978) 436 U.S. 658, 691.) "Entity liability may arise in one of two forms. The

municipality may itself have directed the deprivation of federal rights through an express government policy... Alternatively, [it] may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate*, at p. 328.)

Spooner concedes the City had no "written policy" that authorized discrimination. He claims, however, that he adequately alleged a custom or practice sufficient to satisfy *Monell* standards. We disagree. The practice must be so permanent and well settled as to constitute the equivalent of an express policy authorized by the City's policy makers. (*Monell v Dept. of Social Services, supra,* 436 U.S. at p. 691; *Choate v. County of Orange, supra,* 86 Cal.App.4th at p. 328.) "'Rigorous standards of culpability and causation must be applied' to ensure that the municipality, through culpable misconduct, *was the*

'moving force' behind the injury alleged. [Citation.]" (*Choate*, at p. 328, italics added.)

Here Spooner's complaint does not meet this standard. He alleged all the officers who came to his residence and ignored his wife's verbal complaints "acted...with intent to discriminate base on policy that was sanctioned by the city council members...." But this vague and conclusory language does not suffice. (*Harper ex rel. v. Poway Unified School Dist.* (S.D. Cal. 2004) 345 F. Supp.2d 1096, 1108 [conclusory allegations of discrimination are insufficient].) "A plaintiff must allege with particularity facts in the form of specific overt acts. [Citations.]" (*Taylor v. Mitzel, supra,* 82 Cal.App.3d at 673.)

Spooner does not specifically describe the City's Policy or how it trained or supervised enforcement officers. He does not state facts showing it had a history of encouraging or condoning

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discrimination. Nor does he supply "any underlying factual detail" about how it was the moving force or proximatley caused his damages. (*Haskins v. San Diego Dept. of Public Welfare* (1980) 100 Cal. App.3d 961, 973.) He alleges he incurred storage fees, but does not explain why he could not have parked the trailer in his side or rear yard.

Spooner's complaint states the City's failure to explain why the police did not enforce the code against everyone proved it had a discriminatory enforcement policy. But "a merely unexplained difference in police treatment of similar complaints made by different people" does not establish a denial of equal protection. (*Hilton v. City of Wheeling* (20000 209 F.3d 1005, 1008.) Bradbury's and Youngblood's letters show the City enforced the ordinance on a priority basis and gave rational nondiscriminatory explanations for not proceeding against others. Spooner's allegation that the

City vests discretion its enforcement officers undermines the claim that it was the moving force.

Stripped of its speculation and conslusory language, Spooner's complaint "relies on an assumption that different treatment is always irrational or motivated by discrimination. But this assumption is legally unsound and logically absurd: it would not only validate the 'everyone-else-was-driving-75 defense, but create a cause of action damages on such a claim." (*Fishing Co. of Alaska v. U.S.* (W.D. Wa. 2002) 195 F. Supp.2d 1239,1254.) Even "[t]he conscious execise of some selectivity in enforcement is not in itself a federal constitutional violation." (*Murgia v. Municipal Court, supra,* 15 Cal.3d at p. 299.) Here the fact that the City enforced this ordinance against others at Spooner's request undermines his allegations.

V. *Village of Willowbrook v. Olech*

Spooner contends that he stated a cause of

action for discrimination against the City under *Village of Willowbrook v. Olech* (2000) 528 U.S. 562. We disagree.

In *Olech*, the plaintiff asked a village to connect her property to the municipal water supply. The village demanded a 33-foot easement from Olech, while only requiring 15-foot easements from other property owners. Olech alleged the village did this in retaliation for her prior successful lawsuit against it, and was motivated by "ill will." (*Id.* at p. 563.) The Supreme Court held she could allege an equal protection claim as a "class of one," even thought she did not allege membership is a group. (*Id.* at p. 564.

In his concurring opinion, Justice Breyer stated: "This case...does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause." *Village of Willowbrook v. Olech* (2000) 528

U.S. at p. 565.) "Zoning decisions ...will often, perhaps almost always, treat one landowner differently from another...." (*Ibid.*) But requiring proof of "illegitimate animus" would be "sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right. (*Id.* at p. 566.)

Subsequently, in *Hilton*, the Seventh Circuit stated: We described the class of equal protection cases illustrated by Olech as 'vindictive action' cases and said they require 'proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.' [Citatin.]" (*Hilton v. City of Wheeling, supra,* 209 F.3d at p. 1008.) The municipality must have individually targeted the plaintiff "for reasons of a personal nature unrelated to the duties of the defendant's position." (*Ibid.*)

Here Spooner did not plead such facts and his

conclusory allegations of "ill will" do not suffice. Unlike Olech, the City neither enacted the ordinance to target Spooner nor was he the only one cited. He successfully obtained enforcement by the City against two other owners. Moreover, the result would not change for another reason.

VI. *The Truthful Pleading Doctrine*

The City contends that the trial court properly sustained the demurrer because Spooner made admission which contradicted the facts he alleged in the third amended complaint. We agree.

"As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true...."(*Del E. Webb Corp. V. Structural materials Co.* (1981) 123 Cal. App.3d 593,604.) But "a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (*Ibid*). Where a

party's admissions contradict allegations in a pleading, the court may rely on the admissions and sustain a demurrer. (*Dwan v. Dixon* (1963) 216 Cal. App.2d 260, 265.)

Here the court found that at the first demurrer hearing Spooner said he was not claiming any racial animus on behalf of the City. At the last hearing, he said he did not know if the City was motivated by racial animus. That contradicted his pleadings. The court properly sustained a demurrer because there admissions undermined the allegation of his complaint. (*Dwan v. Dixon, supra,* 216 Cal.App.2d at p. 265.)

We have carefully reviewed Spooner's remaining contentions and conclude that he has not shown reversible error.

The judgement is affirmed. Costs are awarded to respondent.

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NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

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Filed
San Luis Obispo
Superior Court

August 20, 2003
Patricia VanOrden
By Deputy Clerk

SPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

NO. CV030134
RULING ON
DEMURRER
AND NOTICE
OF RULING

NATHAN B. SPOONER, Plaintiff

VS.

CITY OF GROVER BEACH, ET AL., Defendants

Defendant City of Grover Beach's Demurrer came on for hearing of August 5, 2003. Plaintiff appeared in pro per. Defendant City of Grover Beach appeared through Robert Gundert.

Plaintiff has filed this lawsuit seeking relief against the City of Grover Beach based upon two cause of action. The First Cause of Action is entitled "Arbitrary and Improper Selective Code Enforcement." The Second Cause of Action is

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entitled

"Denial of Equal Protection." In both causes of action, Plaintiff complains that the City of Grover Beach has selectively enforced its laws against him by providing notices of 72 hour parking violations because he admittedly parked a trailer of the street in front of his home in violation of Grover Beach Municipal Code Section 5217. Although Plaintiff does not dispute that he violated the Municipal code, he complains that other violators have not been cited or prosecuted by the City of Grover Beach, and that the City is enforcing a regulation against him which it does not enforce against others. He alleges that the lack of enforcement against others is "arbitrary, improper and not based on any reasonable explanation."

Plaintiff relies upon the United States Supreme Court case of Willowbrook v. Olech, (2000 120 S.Ct. 1073), for the

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rule that Plaintiff may allege a violation of equal protection based upon being a "class of one."

In Willowbrook v. Olech, the Village of Willowbrook initially conditioned the Olechs' connection to the city water supply of a requirement that the Olechs grant the Village a 33 foot easement. The Olechs objected, and claimed that the Village required only a 15 foot easement from all other property owners. After an initial delay of three months, the Village relented and agreed to provide water service based upon the standard 15 foot easement. The Olechs then sued, claiming that easement demand was "irrational and wholly arbitrary" and further claiming that the Village's demand was actually motivated by ill will resulting from their previous filing of an unrelated lawsuit against the Village. The Supreme Court held that:

> "The complaint also alleged that the Village's demand was 'irrational and wholly arbitrary' and that the

Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protetion analysis.: Id at 1075.

This case does not involve a property dispute with a municipality. Instead, Plaintiff seeks relief because, while he admittedly violated the law, the same saw was not enforced against others. As stated in at least one other case rejecting the application of the Willowbrook v. Olech principle to the facts of the case, Plaintiff essentially is asserting the "everybody else was driving 75 miles per hour" defense. See, for example, Fishing Company of Alaska v. United States (W.D. Washington 2002) 195 F. Supp.2d 1239, 1254, wherein the Court stated:

> "To succeed on such a claim, the plaintiff must prove that it has been 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment' (citing Willowbrook v. Olech at p. 1073.) Such a claim in similar to a selective prosecution claim, where the plaintiff must demonstrate that the prosecution 'had a

> discriminatory effect and that it was motivated by a discriminatory purpose.' (citation omitted)...but even assuming there was different treatment here, plaintiff has presented no evidence that the decision to prosecute plaintiff and no other vessel was irrational or motivated by a discriminatory purpose. Plaintiff' argument relies on an assumption that different treatment is always irrational or motivated by discrimination. But this assumption is legally unsound and logically absurd: it would not only validate the 'everyone-else-was driving-75' defense, but create a cause of action for damages on such a claim."

See also Fenje v. Board of Governors of the University of Illinois at Chicago Medical School (N.D. Illinjois 2002) 2002 WL: 959837, wherein the Court stated:

> "If a merely unexplained difference in police treatment of similar complaints made by different people established a prima facie case of denial of equal protection of the laws, the federal courts would be drawn deep into the local enforcement of petty state and local laws."

For these reasons, it does not appear that Willowborrk v. Olech applies to a case such as this one, where Plaintiff claims merely that local laws are being enforced against him

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and not against others. As stated in Cain v. Tigard-Tualatin School District (D. Oregon 2003) 262 F. Supp.2d 1120, 1130:

> Village of Willowbrook involved a city's discriminatory behavior in conditioning a property's owner's connection to a municipal water supply on the owner's granting of an easement. The Supreme Court gave no indication that the holding extended beyond matters involving municipal property disputes. The Supreme Court surely would have spoken more clearly if it intended to extend the reach of the Fourteenth Amendment's Equal Protection Clause to every instance of arbitrary state action."

In this case, Plaintiff does not allege vindictive action, or ill will, nor does he allege that the action was taken against a member of a protected class. Although referring to his wife's ethnicity in the Complaint, the Complaint does not allege that the City of Grover Beach took action based upon her ethnicity or race, and Plaintiff stated at the hearing that the Complaint was not based on such an allegation.

Accordingly, the demurrer is sustained, with leave to amend in order to allow Plaintiff to state a valid claim if he can.

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Plaintiff shall have 30 day leave to amend. In the absence of an amendment within 30 days, that action shall be dismissed.

The motion to strike is taken off calendar as moot.

Dated: August 20, 2003

MARTIN J. TANGEMAN
JUDGE OF THE SUPERIOR COURT

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Court of Appeal, Second Appellate District,
Division Six –
No. B 178096
S1405322

IN THE SUPREME COURT OF CALIFORNIA

En Banc

NATHAN B. SPOONER, Plaintiff and Appellant,

v.

CITY OF GROVER BEACH, Defendant and Respondent.

Petition for review DENIED

SUPREME COURT
FILED
Feb 22, 2006
Frederick K Ohirich
Clerk Deputy

GEORGE

Chief Justice
Apendix C